

**State of Michigan
In the Supreme Court**

Appeal from the Michigan Court of Appeals
Hoekstra, P.J., and Wilder and Zahra, JJ.

People of the State of Michigan,
Plaintiff-Appellee,

Supreme Court No. 126025

Court of Appeals No. 245889

vs

Circuit Court No. 02-009348-FC

Duane Joshua Houston,
Defendant-Appellant.

Appellee's Supplemental Brief on Appeal

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Other authorities

MCL 750.317	1, 3, 6, 7
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Counter-Statement of facts

Defendant Houston appealed by right his jury-based convictions for second degree murder, MCL 750.317, and felony firearm, MCL 750.227b and sentence for habitual offender, second offense. The Court of Appeals rejected defendant's argument that the trial court abused its discretion in admitting evidence that three days before the murder he possessed a weapon similar to the one used in the murder. Defendant also maintained that imposition of a life sentence for second-degree murder was improper because Judge Ransom relied on inaccurately scored sentencing guidelines. The Court of Appeals held that the trial court did not abuse its discretion in admitting the evidence in question. Although defendant's arguments regarding the scoring offense variables OV 3 and OV 14 were found to be meritorious, the Court of Appeals **assumed** that OV 3 was improperly scored, but held as matter of first impression, a life sentence for second degree murder was proper even under defendant's version of the correct scoring since defendant was an habitual offender. [Appendix 15a-18a]

The case is before this Court on leave to appeal granted to defendant. The Court limited review to the following issues: (1) whether Offense Variable 3, MCL 777.33 was properly scored; and (2) whether a sentence of life falls within the statutory sentencing guidelines for second degree murder for a defendant who is an habitual offender. *People v Houston*, SC 126025 (2004). [Appendix 19a]

Appellee's Supplemental Argument on Appeal

Issue II

Whether a sentence of life falls within the statutory sentencing guidelines for second degree murder for Defendant who is a habitual offender.

Standards of review

As a general rule interpretation and application of the Michigan statutory sentencing guidelines, MCL 771.11 *et seq.*, involves questions of law which are reviewed *de novo*. *People v Perkins*, 468 Mich 448, 452 (2003); *People v Morson*, 471 Mich 246 (2004).

Argument

This Court's leave grant in the case *sub judice* limits the appeal to the following questions: (1) whether Offense Variable 3, MCL 777.33, was properly scored; and (2) whether a sentence of life falls within the statutory sentencing guidelines for second-degree murder for a defendant who has an habitual offender.

Appellee's supplemental argument is offered to assist the Court in deciding the question of the propriety of the trial court's imposition of a life sentence for the offense of second degree murder.

Counsel for the respective parties have filed their briefs on appeal. The Prosecuting Attorneys Association of Michigan has filed a brief *amicus curiae* in support of the State of Michigan as to Issue I. Appellant has submitted supplemental authority for the Court's consideration referring to two recently decided Court of Appeals cases. *People v Brown*, CA 250016 (Jan. 27, 2005) is offered as supplemental authority in

response to Issue I as further support appellant's argument that OV 3 was improperly scored by the trial judge.

In *Brown* the Court of Appeals held that no points may be scored for OV 3 in cases of homicide. The Genesee County Prosecutor has filed for Michigan Supreme Court review in *Brown*. See *People v Brown*, SC 128199.

Appellant *Houston* has also submitted another recent published opinion of the Court of Appeals in *People v Johnigan*, CA Nos. 250909, 251408 (Mar. 22, 2004) (2005 WL 668824). In *Johnigan* Judge Sawyer engages in a discussion expressing disagreement with the Court of Appeals decision in this case of *People v Houston*. Judge Sawyer also expresses his disagreement with dissenting Judge O'Connell's sentencing guidelines discussion. Judge O'Connell, for his part, says that he disagrees with *Houston* and would not follow it if it were not binding precedent. He also states:

... I would hold that the habitual offender statutes provide the sentencing court with the discretion to sentence defendant to life imprisonment. I would also recognize that life imprisonment is a determinate sentence that does not carry a minimum term, so legislative guidelines for setting a minimum term simply should not apply.

In other words, Judge O'Connell argues that the sentencing guidelines do not apply to life sentences at all since a life sentence is a determinate sentence without a minimum to be imposed.

Defendant *Houston*'s second degree murder conviction authorized the trial judge to sentence in these terms:

MCL 750.317 Second degree murder—All other kinds of murder shall be murder of the second degree, and shall be punishable by imprisonment in the state prison for life, or any other term of years, in the discretion of the court trying the same.

In addition to the arguments advanced in their brief on appeal, the people assert that adoption of the sentencing guidelines was not intended by the legislature to trump the judicial discretion in the sentencing process as provided by the Criminal Code unless specifically provided for. See e.g., *Commonwealth v Murphy*, 592 A2d 750 (Pa. 1991).

Other jurisdictions have held that where a Guideline conflicts with a sentence fixed by statute, the latter will prevail. See **21 A Am Jur 2d, Criminal Law**, sec. 847—**Effect of Guidelines on other statutes**. For example, in *United States v Valente*, 961 F2d 133 (CA 9 1992) the mandatory minimum sentence for the crime to which defendant pleaded guilty was ten years. [21 USC sections 846 & 841(b)(1)(A)(vii)] The court on appeal held:

... When a statute requires a different sentence than that set by the Sentencing Guidelines, the statute controls. *United States v Sharp*, 883 F2d 829, 831 (9th Cir, 1989) citing *United States v Donley*, 878 F2d 735, 740-41 (3rd Cir. 1989); and *United States v Savage*, 863 F2d 595, 600 (8th Cir. 1988). The Sentencing Guidelines expressly defer to statutorily mandated sentences that conflict with the guidelines, *Sharp* 883 F2d at 831, citing U.S.S. G section 5G1.1 commentary.

In *United States v Donley*, 878 F2d 735 (1989) the defendant was sentenced under the Sentencing Guidelines promulgated by the United States Sentencing Commission pursuant to the Sentencing Reform Acts of 1984. He contended that a sentence of life imprisonment was not mandatory, and that the District Court erred in imposing one on that basis. Defendant contended 18 USC section 3559 (Supp V 1987), sec. 3581 (Supp V 1987) and the Sentencing Guidelines supercede section 1111 and confer on the trial judge the discretion to impose a sentence for first degree murder less than the life sentence prescribed by sec. 1111. In rejecting the defendant's argument, the court variously found

that the legislative history shows that Congress did not intend to change the sentencing provisions of existing law when it introduced the grading system. The Court also said :

Finally, we note that the Sentencing Guidelines also fail to support appellant's claim that the District Court can deviate from the penalty prescribed in the underlying statutes. While the Supreme Court has stated in *Mistretta v U.S.*, 488 US 231 (1989) that the Sentencing Guidelines are not only constitutional but are legally binding on the courts, they do not supercede the underlying statute for any offense. The Sentencing Guidelines themselves recognize this fact. See United States Sentencing Commission Guidelines Manual at 5G1.1. Section 54G1.1 states that if the application of the Guidelines results in a sentence either above the maximum authorized by the statute for the offense of conviction or below the minimum required by the statute, that the statutory maximum or minimum shall be the Guidelines sentence. In other words, the underlying statute shall control in case of conflict with the Sentencing Guidelines.

See also *United States v Kirvan*, 86 F3d 309 (2d Cir.1996); *United States v Vise*, 211 F3d 1279 (10th 2000); *United States v Allen*, 16 F3d 377 (10th Cir. 1994) as authority for the proposition that sentencing statutes trump the guidelines when the two conflict.

In Michigan MCL 769.9(2) authorizes the trial court to impose a sentence of life imprisonment.

In all cases where the maximum sentence in the discretion of the court may be imprisonment for life or any number or term of years, the court may impose a sentence for life or may impose a sentence for any term of years. If the sentence imposed by the court is for any term of years, the court shall fix both the minimum and the maximum of that sentence in terms of years or fraction thereof, and sentences so imposed shall be considered indeterminate sentences. The court shall not impose a sentence in which the maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence.

The sentencing guidelines, MCL 769.34(5) provides “If a crime has a mandatory determinate penalty or a mandatory penalty of life imprisonment, the court shall impose that penalty. This section does not apply to sentencing for that crime.

Where possible, a reviewing court is obliged to construe legislation which deals with the same subject harmoniously. *State v Haydon*, 832 P2d 457 (1993). Stated another way, statutes that appear to conflict should be read together and reconciled, if possible. *World Book, Inc., v Dep’t of Treasury*, 241 Mich App 673, 681 (1999).

The people submit that construing the above referenced statutes in *pari materia*, *Jackson Comm College v Dep’t of Treasury*, 241 Mich App 673, 681 (2000), this Court should find that the legislature did not intend to replace the life sentence for second degree murder with an indeterminate sentence. That is, there is nothing in the criminal code to indicate that the legislature intended to change the sentencing provisions of existing law on second degree murder, MCL 750.317, when it introduced sentencing guidelines. The people maintain that it is clear that the adoption of the sentencing guidelines did not trump the statutory penalty for second degree of life imprisonment. Accordingly, as aptly observed by Judge O’Connell in *People v Johnigan, supra*, the sentencing guidelines do not apply to a sentence of life imprisonment.

While, effective January 1, 1999, the guidelines with sentencing ranges *do* require adherence by Michigan sentencing judges, *People v Hegwood*, 465 Mich 432 (2001), the people submit, the trial court in the case *sub judice* properly imposed a life sentence for second degree murder, notwithstanding the fact that defendant was an habitual offender. The trial court here reached the right result albeit for possibly the wrong reason. *People v Goold*, 241 Mich App 333, 342, n 3 (2000).

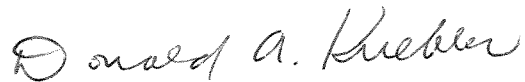
This Court should conclude that the sentencing guidelines do not trump the Criminal Code, MCL 750.317, as it relates to this case and thus affirm defendant's sentence of life imprisonment for second degree murder.

Relief

Wherefore, the people pray that this Honorable Court will deny defendant's request for resentencing.

Date: April 5, 2005

Submitted by

A handwritten signature in cursive script that reads "Donald A. Kuebler".

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